

APPEAL NO. 991496

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 14, 1999, a contested case hearing (CCH) was held. At issue was whether the respondent, who is the claimant, sustained a compensable repetitive trauma injury to his right wrist, elbow and shoulder on _____. The hearing officer determined that he sustained such injury. The claimant was employed at the time of his injury by the appellant, (Company), a certified self-insured that will be referred to herein as employer or carrier, depending upon the context of the reference.

The carrier appeals, and complains of the bizarre development in the CCH in which the ombudsman and hearing officer got into a "rather heated argument" culminating in the recess of the CCH by the hearing officer, who stated that he would reset the CCH to another time. The carrier points out that a new decision was issued without the promised resumption of the CCH. The carrier argues that a decision was inappropriate and that the hearing officer conceded on the record that he did not have a full record on the claimant's claim. The carrier further argues the evidence that it asserts is contrary to the holding reached by the hearing officer. The carrier finally states that the decision appears to be based on factors not having to do with the evidence and that the matter should be remanded for a hearing before a different hearing officer. The claimant responds that the decision should be affirmed.

DECISION

Affirmed.

The claimant had worked for the employer for nearly 11 years. He said he was a sewing operator who sewed belt loops at the time of the injury, which he had been doing for about a month. He said that he sewed loops on approximately four packs of 60 pants per day (or 240 pairs of trousers). Claimant said he started feeling pain in his wrist on his right hand, then his arm, and then up to his shoulder. The pain would start when he turned the pair of pants on which he worked. As claimant demonstrated his actions during the CCH, he would pick up a pair of pants in his left hand, put it next to the machine and then lower a lever so he could put a loop in, turn the pair, press it, and then turn it again. Each pair of pants had seven loops. With his right hand, he would press the lever and use his right hand to toss a finished pair on a cart. Both hands were used during the sewing operation. He said he reported two instances of pain to his supervisor the day it occurred.

Claimant said that he reported the injury to his supervisor and the employer on _____, and began light duty on that date. When he resumed sewing, his pain started again and he was sent to see Dr. N, on January 23, 1999. He saw the doctor a few more times and was diagnosed with tendinitis. This is borne out by the Initial Medical Report (TWCC-61). He said he was scheduled for an MRI, which was canceled because the carrier disputed the injury. He said he came to the Texas Workers' Compensation

Commission to get permission to see another doctor, Dr. A. Dr. A diagnosed carpal tunnel syndrome. Dr. A's TWCC-61 lists right elbow and shoulder strain as the primary diagnoses, and a cervical problem.

Claimant said he had not lost work as a result of the injury and was currently sewing at full capacity. He said that while the pain in his arm had passed, his shoulder and wrist hurt a lot more. Although only one report from Dr. A was in evidence, the claimant said that he was frequently treated by the doctor. He denied he had made the injury up or that there would be any reason for him to have done so.

It became clear through cross-examination that the carrier's theory of defense was that the claimant had heard the plant was going to close within a year and decided not to work too hard anymore if that was the case. He denied telling two coworkers one day at lunch that if he faked an injury, he could be assigned light duty and avoid being put on a "training curve." There was testimony that claimant had claimed two or three previous compensable injuries.

Claimant agreed that the lever he had to push was very easy to operate and was pneumatically operated. The names of the coworkers whom he was alleged to have told that he was not really injured were Ms. S and Ms. W. On redirect, the claimant began testifying about the fact that Ms. S was thought by some to be a troublemaker, and that Ms. W was angry about being questioned by the employer two times because she felt that Ms. S had "got me into a problem." At this point, the hearing officer interrupted *sua sponte* to question the relevance of this line of questioning, pointing out that claimant's testimony was not necessarily tied to the injury and it was not clear what trouble Ms. W was reportedly describing. The ombudsman assisting the claimant did not understand the advice that the hearing officer was giving and a recess was taken. After the recess, the ombudsman asserted she wanted to continue questioning the credibility of these witnesses and the hearing officer pointed out that these persons had not yet been called, and that once they were, she could continue this line of questioning. The carrier then called both Ms. S and Ms. W to testify.

Ms. S said that during a conversation she had with claimant at mealtime, he noted that the plant would close in a year so he was going to go to a doctor with a claim of a hand injury and get taken off work for several months. She said it was her "impression" that claimant was going to make up an injury. However, Ms. S agreed that claimant contended his hand actually hurt him, but only when he drove. Ms. W testified that she was testifying under a subpoena and did not want to be there. Her recollection of the conversation was that claimant said his hands hurt when he drove, that he had gone to see a doctor and that perhaps he would get a six-month disability. She also recalled claimant saying something to the effect that a doctor could not verify when someone complained they were hurting. On cross-examination, Ms. W said she did not actually hear the claimant and Ms. S told her later on what he said.

Ms. MZ, whose role with the employer was not developed, said that Ms. S reported that claimant told her he was not really injured and just wanted to get something out of the company. Ms. MZ also testified that some unnamed supervisors reported to her that claimant had suggested to other employees that they make similar reports of injury. After a short break, the claimant tendered a rebuttal witness. The hearing officer, *sua sponte* and with no objection having been made by the carrier, denied the witness. After making an objection, the ombudsman then indicated the desire to call the claimant in rebuttal. At this point, the hearing officer announced that he was going to go ahead and reset the hearing for another date. No explanation was forthcoming in the record for such action, which was done over the objection of the ombudsman. We will note that this was preceded by the hearing officer going off the record, and the references the carrier makes in its appeal to heated discussions may have happened at that time.

Although this sequence of procedure is not to be commended, we cannot agree that reversible error was the result. The carrier had completely presented its case. Even without rebuttal witnesses, the hearing officer could plainly choose to assess lower credibility to the statement of Ms. W, who admitted that she had not directly heard the statements of the claimant about which she was called to testify. If either party were aggrieved by the failure to rest the CCH as promised, it would be the claimant, had he lost, not the carrier, whose case was fully presented.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.- Beaumont 1993, no writ). The decision and order of the hearing officer are sufficiently supported by the record and are hereby affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge